

The Commonwealth of Massachusetts

Committee for Public Counsel Services

Immigration Impact Unit

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I, Jennifer Klein, being a duly licensed attorney in the Commonwealth of Massachusetts, do hereby state the following:

1. I am a staff attorney in the Immigration Impact Unit at the Committee for Public Counsel Services (CPCS). I have been in this position for eight (8) years.
2. In that capacity, I provide training, support, and advice on individual cases to all CPCS staff attorneys and bar advocates on the immigration consequences of criminal conduct. I distribute written training and resource materials about this area of law and I lecture frequently in Massachusetts on this area of law.
3. One of the concerns that has existed for many years is how to transport a client in ICE custody in Massachusetts back to state court for criminal proceedings. For at least five years leading up to 2017, criminal defense attorneys needed to request that the state court issue two habeas requests. One was sent to ICE Enforcement and Removal Operations (ERO) in Burlington, MA. The other habeas request was sent to the Massachusetts Sheriff's Department for the county in which the court was located.
4. Throughout the years, the coordination that was required after the habeas requests were issued changed. At times, the defense attorney would coordinate between ICE and the Sheriff's Department. At other times, ICE required that the District Attorney's Office coordinate the transportation. In either scenario, the system did not always work perfectly or consistently, but it did provide a mechanism by which ICE detainees held in Massachusetts could be brought back into state court for proceedings.
5. Starting in early 2017 the IIU began hearing reports from defense attorneys that clients in ICE custody were no longer being transported to state court despite following the procedures previously arranged with ICE.
6. By October 2017, the transportation process had broken down so significantly that we issued an updated advisory indicating that the prior practice was no longer reliable and asking to be informed when the process did not work. We received regular reports of individuals not being transported despite habeas requests being sent from the court.

7. At some point in the last year, we received reports that when a Sheriff's Department arrived at an ICE detention facility prepared to transport an individual based on the habeas from the court, it was informed by ICE officers that ICE would not release the individual to the custody of the Sheriff.
8. It is my understanding and belief that after the SJC decision in *Lunn v. Commonwealth*, 477 Mass. 517 (2017), ICE officials developed a policy of refusing to allow individuals to attend their state court proceedings. On March 2, 2018, I was present when Acting Field Office Director Thomas Brophy acknowledged such a policy while speaking on a panel at an American Immigration Lawyers Association conference in Boston, Massachusetts.
9. In addition to prohibiting the Sheriff's Department from providing transportation in these instances, it is my understanding that ICE refused to itself provide transport to state court for the individuals in their custody.
10. I am aware that, March 12, 2018, in the case *Pensamiento v. McDonald*, an ICE detainee at Plymouth County Correctional Facility moved for a federal temporary restraining order requiring his transport to a criminal proceeding in Chelsea District Court. Judge Allison D. Burroughs, sitting as emergency judge, held a hearing on the motion on March 15, 2018. At that hearing (which I attended), ICE and the other respondents consented to the entry of such an order, which Judge Burroughs entered shortly thereafter. *See Ex. A* (March 15, 2018 Temporary Restraining Order (Docket No. 17), *Pensamiento v. McDonald*, C.A. No. 18-10475-PBS (D. Mass.)).
11. During that hearing in *Pensamiento*, ICE indicated that, in the future, it expected that immigration detainees could be transported to Massachusetts proceedings if the Massachusetts court incorporated certain terms into the state writs of habeas corpus *ad prosequendum*. *See Ex. B* (March 15, 2018 Tr. at 10, *Pensamiento v. McDonald*, C.A. No. 18-10475-PBS (D. Mass.)). I later received a copy of that new language. A true and accurate copy of the language I received is appended hereto as Exhibit C. It was my understanding that if this language was included on the habeas sent to ICE, the defendant would be transported to state court. My office provided an updated advisory that included this language and encouraged defense attorneys to follow the procedure as explained to us by ICE.
12. After this update, we received many reports of defendants still not being transported to state court. For example, I am aware that, by May 2018, a second ICE detainee had moved for a federal temporary restraining order requiring transportation to state proceeding, this time in the case *Alvarez Figueroa v. McDonald*. Following a hearing, Chief Judge Patti B. Saris ruled on May 2, 2018, that the detainee had "a due process right to be present at the state court criminal proceedings against him," and entered the requested order. *See Ex. D* (May 2, 2018 Order (Docket No. 41), *Alvarez Figueroa v. McDonald*, C.A. No. 18-10097-PBS (D. Mass.)).
13. Following this ruling, we continued to receive reports of defendants still not being transported to state court. For example, I am aware that the Chelsea District Court held ICE and the Department of Homeland Security in contempt on May 10, 2018, for failing to transport an ICE detainee to a court appearance. *See Ex. E* (Docket Sheet in *Commonwealth v. Figueroa*, 1814CR000790 (Chelsea Dist. Ct.)).<sup>1</sup>

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<sup>1</sup> The two Figueroa cases appear to involve different defendants with similar surnames. The detainee in the federal case was Jaime Antonio Alvarez Figueroa. The detainee in the referenced state case was Pablo Figueroa.

14. In July 2018, I learned that the Executive Office of the Trial Courts had instructed judges not to include the language that ICE provided in *Pensamiento*. In response, I contacted the District Court Administrative Office to try to understand how to proceed. I was told that ICE and the trial courts were working together to create a system for transporting defendants. As of today, I am not aware of any agreed upon procedure for transporting defendants or any information that has been issued to the courts or the sheriffs.
15. In November 2018, through litigation in *Doe v. Tompkins*, No. 18-cv-12266-PBS (D. Mass.), I learned that ICE asserts that ICE officials and “the Executive Office of the Trial Court agreed in September 2018 to standardized language for a Massachusetts state court to use to order the transfer of a detainee to appear in state court.” See Ex. F (Decl. of Alan Greenbaum, *Doe v. Tompkins*, No. 18-cv-12266-PBS (D. Mass.)). I have also received a copy of the language provided by ICE in that litigation, which I understand to be the language to which the Massachusetts courts purportedly agreed. A true and accurate copy of the language I received is appended hereto as Ex. G. I shared this language with specific defense attorneys who were trying to get their clients transported to court. In each case it failed and the defendant was not transported. Indeed, even in the *Doe* case, use of the language supplied by ICE did not result in the defendant’s transportation to state court. See Ex. H (Decl. of David Wesling, *Doe v. Tompkins*, No. 18-cv-12266-PBS (D. Mass.)).
16. During this time, I was informed by staff at the District Court Administrative Office, as well as colleagues who were in direct contact with Field Office Director at ICE-ERO, that ICE would “approve the habeas” sent from the state court, but that ICE’s position is that the Sheriff who was holding the defendant in immigration custody (i.e. the Sheriff with the intergovernmental service agreement, “IGSA,” with ICE) is responsible for transporting the defendant to court. It appears, however, that at least some of the Sheriff’s Departments housing ICE detainees do not agree with ICE’s position. This appears to leave ICE detainees who are housed by those Departments with no means to be transported to court.
17. For the individuals not transported to court, in the majority of cases, the criminal case remains open and a default warrant issues. The ongoing problems with transportation have been increasingly frustrating to defendants as well as to the criminal justice system generally. It is particularly problematic given that ICE is arresting individuals at courthouses with pending cases and then will not facilitate their return to court, so the cases remain open indefinitely.

Signed under penalties of perjury this 26 day of November 2018.



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